Supreme Court, U.S.
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80-870

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DENNIS PERRY JR.,

PETITIONER,

vs.

PEOPLE OF THE STATE
OF ILLINOIS,

RESPONDENT.

ON
PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Did the warrantless search of the automobile which Petitioner drove on the afternoon of his arrest violate his 4th Amendment rights:

(A) When the police had 7-1/2 hours to obtain a search warrant for the car between the time a description of the car was given to them and the time the car was stopped.

(B) In the absence of reasonable grounds to believe that a car contains stolen goods, contraband or evidence may that car be searched.

(C) When the police see students loading things into a car beside a college

dormatory and none of the things loaded are identified as proceeds from a burglary which occurred 15 hours earlier does the fact that the car looked like the car seen at the burglary give the officers reasonable grounds to believe that the person driving the car away from the dormatory was a burglar.

(D) When the warrantless search of an automobile is sought to be justified as a search incident to an arrest but the search occurs after the Petitioner is locked in the police station.

(E) When the warrantless search

> of an automobile is sought to be justified as an "inventory" search but the apparent purpose of the search was to look for evidence in a burglary investigation and the state failed to prove that the search was a part of any routine forfeiture or property protecting procedure.

(2) When the Petitioner, a student from Illinois State University, challenged the Array from which his jury was selected on the grounds that the jury pool contained no students (although students make up a third of the population of Bloomington-Normal Illinois [the city where trial was held])and when he offered to prove that students were significantly under-

represented in the Array, was the fact that the Motion and Offer of Proof were oral rather than written, an adequate state ground for denying Petitioner a hearing on his claimed violation of the Sixth and 14th Amendment rights to a jury chosen from a fair cross section of the community.

THE PARTIES

The Petitioner Dennis Perry was Petitioner in the Supreme Court of Illinois, Appellant in the Illinois Appellant Court, Fourth District and Defendant in the Circuit Court of McLean County, Illinois.

The Respondent, People of the State of Illinois, was Respondent in the Supreme Court of Illinois, Appellee in the Illinois Appellant Court, Fourth District, and Plaintiff in the Circuit Court of McLean County. There were no other parties in the proceedings in any of the lower courts.

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DECISIONS BELOW

The Illinois Supreme Court's denial of Leave to Appeal on September 29, 1980 is unreported. (A copy of the denial is found in the Appendix on Page A1).

The decision of the Appellate Court of Illinois is reported People v. Perry 81 Ill. App. 3rd 422, 37 Ill. Dec. 170, 401 NE2d 1263 (4 th Dist. 1980).

JURISDICTIONAL STATEMENT

The Judgment of the Supreme Court of Illinois denying leave to appeal was entered September 29, 1980. The time of day when it was entered on the 29th cannot be ascertained from the record. No rehearing of the denial of leave to appeal was sought and this Petition for Certiorari will be timely if filed by mail on or before November 28, 1980

without an extension. The Petitioner invokes this court's jurisdiction under 28 USC §1257(3) and petitions for a Writ of Certiorari to the Supreme Court of Illinois.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

4th Amendment to the Constitution of the United States

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describes the place to be searched, and the persons or things to be seized.

6th Amendment to the
Constitution of the United States

In all criminal prosecutions, the Accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

§1,14th Amendment to the
Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat. ch38 §114-3(b):

Motion to Discharge Jury Panel.

(a) Any objection to the manner in which a jury panel has been selected or drawn shall be raised by a motion to discharge the jury panel prior to the voir dire examination. For good cause shown the court may entertain the motion after the voir dire has begun but such motion shall not be heard after a jury has been sworn to hear the cause.

(b) The motion shall be in writing and shall state facts which show that

the jury panel was improperly selected or drawn.

(c) If the motion states facts which show that the jury panel has been improperly selected or drawn it shall be the duty of the court to conduct a hearing. The burden of proving that the jury panel was improperly selected or drawn shall be upon the movant.

(d) If the court finds that the jury panel was improperly selected or drawn the court shall order the jury panel discharged and the selection or drawing of a new panel in the manner provided by law.

Ill. Rev. Stat. ch78 §1

The county board of each county, except those counties which have jury commissioners as provided in "An Act in relation to jury commissioners and authorizing judges to appoint such jury commissioners and to make rules concerning their powers and duties", approved June 15,1887, as amended, shall at or before the time of its meeting, in September, in each year, or at any time thereafter, when necessary for the purpose of this Act, make a list of sufficient number, not less than one-tenth of the legal voters of each town or precinct in the county, giving the place of residence of each name on the list, to be known as a jury list. The list shall be made by choosing every tenth name, or other whole number rate necessary to obtain

the number required, from the latest voter registration lists of all the towns or precincts in the county. The lists of the several towns or precincts shall be arranged alphabetically or numerically, as the case may be, and the count of names shall run continuously rather than starting over with each town or precinct.

STATEMENT OF THE CASE

At a hearing on Petitioner's pre-trial written Motion to Surpress, physical evidence the state conceeded that the Petitioner was arrested without a search or arrest warrant (R.P. 6-7). The arresting officers did not see the Petitioner violate any law (R.P. 29,48). On December 18, 1978 at about 9:00 a.m. Martin Beltz reported to police that at 1:00 a.m. that morning he had seen a black-over-yellow Buick partially blocking his driveway. (R.P. 11). A burglary and home invasion had occurred in the house next to Beltz at about 1:00 a.m. The description of the car given by Beltz was posted on the police bulletin board (R.P. 64) and broadcasted over police radio (R.P. 13) but no search warrant was obtained (R.P. 6-7).

About 4:25 p.m. on the 18th, Officer Silvey found a black-over-yellow Buick corresponding to Beltz's description parked by an Illinois State University dormatory. (R.P.22). Silvey reported his discovery on the police radio (R.P. 22). He watched the car for about 20 minutes while one black man and three black men or women loaded the car (R.P.23). Although Silvey saw the individuals bring things to the car on wheeled carts - carts used by students to take things to and from dormatory rooms (R.P.24) - he could not tell what items were loaded on the cart (R.P.24). Silvey did not claim to have seen any stolen goods loaded into the car (R.P. 23-25).

In response to Silvey's radio report, Detective Keim and Lieutenant Kemp drove to the dormatory and watched the parked

car for 15 minutes (R.P.42). Keim and Kemp watched two or three individuals load objects into the trunk and front seat of the car, but could not see exactly what they were loading (R.P.42).

Eventually the car drove away from the dormatory (R.P.42). The police then stopped the car and arrested the two occupants (R.P.43). The Petitioner and Maxine Moise were patted down (R.P. 43). Petitioner was arrested about 14 hours after the crime was reported (R.P.54). The police checked the interior of the car and noticed stereo equipment and speakers in the car, and a lot of things including a refrigerator and book stand in the open trunk (R.P.43). The police did not then notice it was a Pioneer stereo (R.P.49) and could not tell the serial

number or model (R.P.49). The Petitioner told the police that he had borrowed the car, but that they could move it (R.P. 43).

The Petitioner and Moise were placed in Detective Keim's car, then Officer Kearney drove the Buick to the police station (R.P.58).

After the car was behind the police station, Lieutenant Kemp, Detective Keim and Officer Hood recovered an amplifier from the front seat of the vehicle (R.P.58). During the search of the car at the police station, the officers determined the model number of the stereo (R.P.50). Kemp found a Pioneer amplifier on the front seat of the vehicle next to the driver's seat (R.P.44). Kemp read the serial and model number to Detective Keim (R.P.44).

Keim saw that the serial number and model number matched the numbers of the stolen amplifier shown on the police report (R.P. 44-45).

No warrant was obtained to search the car after the Petitioner was arrested and before the car was searched in the police parking lot.

When confronted with the information that a stolen stereo had been found in the car, the Petitioner executed a consent to search his dormatory room. However, no consent was obtained for the search of the car.

The federal constitution challenge to the search was made in the written pretrial Motion to Suppress, at the hearing on the Motion to Suppress (R.P. 6-88).,when the items seized were offered in evidence (R.P. 371).,by a

written post trial Motion, on appeal in the Appellate Court and by petition for leave to appeal to the Supreme Court of Illinois.

The trial court denied the Motion to Suppress (R.P. 87-88), admitted the items over objection (R.P. 371), and denied the Motion for New Trial (Report of Sentencing Hearing 20-21). The Appellate Court rejected Petitioner's Fourth Amendment attack on the seizure 401 NE2nd at 1269. The Illinois Supreme Court denied leave to appeal.

Immediately before the selection of the jury, the Petitioner challenged the array of the pool from which the jury was selected (R.P. 99-100). The Petitioner asserted that from the face of the jury list it appeared that Illinois State University students had

been excluded from the array (R.P.99). The Petitioner offered to prove the exclusion by testimony (R.P.100). The trial Judge denied the motion on the grounds that it was oral rather than written (R.P.100). The Defendant filed a written and verified Post Trial Motion alleging in part:

> "The purposeful refusal of the Clerk of the Court not to use student registration lists from Illinois State University in creating the pool from which venires are called, the failure of the array to include any students, the failure to include any students among prospective jurors or jurors chosen the overruling of Defendant's challenge to the array without

hearing evidence, deprived the Defendant of jury pools which reasonably represented the community, and deprived the Defendant of his rights under the Sixth and Fourteenth Amendments to the United States Constitution to a petit jury selected from a fair cross-section of the community. DUREN v. MISSOURI - U.S.-58 Led 2d 579, 99 S.Ct-(January 9, 1979). TAYLOR v. LOUISIANA 419 U.S. 522 (1975). Bloomington-Normal has a population of about 71,000 people. Illinois State University at Normal has an enrollment between 17,000 and 20,000 students. The student population makes up a sign-

ificant and distinct group within the population of McLean County. The students population is younger and contains more blacks than the population of the County as a whole. On the face of the jury lists, it was apparent that students from Illinois State University had not been included in the group of prospective jurors. The Court erred in denying Defendant's challenge to the array (R.P. 99,100). The prospective jurors examined contained no students (R.P. 102, 195). Chapter 78 §1, Ill. Rev. Stat. (1977) is unconstitutional as applied to McLean County where the intentional use of voter lists purposefully excludes the overwhelming

majority of the students at Illinois State University. The Court should require a new trial by a jury selected from potential jurors which include a fair cross-section of the community (including Illinois State University students), and should order the hearing of evidence in support of Defendant's challenge to array."

The Post Trial Motion was denied. (Report on Sentencing Hearing At p.20-21). The Appellate Court rejected the Petitioner's 6th and 14th Amendment challenge to the jury array on the grounds that it was oral not written 401 NE2d at 1269. The Supreme Court of Illinois denied leave to appeal.

ARGUMENT

I.

The Petitioner has no place else to turn for protection of his 4th Amendment rights. Ever since STONE v. POWELL 428 U.S. 465 Certiorari, not habeas corpus, is his last chance to vindicate a 4th Amendment claim. Concurring opinion of Mr. Justice Marshall and Breman MINCEY v. ARIZONA 437 US 385 at 402.

Last term this court reaffirmed the automobile operator's justified expectation of privacy and held that people are not shorn 4th Amendment protection when they step into their automobiles DELAWARE v. PROUSE 440 U.S. 648, 662-663.

In COOLIDGE v. NEW HAMPSHIRE 403 U.S. 443 at 454-455 this court held that the search of an automobile requires a warrant unless the state establishes that one of the well defined jealously and carefully drawn exceptions to the warrant requirement applies. The following sections of argument discuss those exceptions.

(A)

One exception frequently applied to automobiles is the CARROL v. UNITED STATES 267 U.S.-132 exigent circumstances exception for fast moving automobiles. The notion is that the car will drive away before a judicial officer can be found to issue a warrant. In COOLIDGE 403 at 463-462 the court found that the car was not in danger of being moved and declined to apply the exigent circumstances exception. The more time that elapses between the time the police learn facts which prompt the seizure and the seizure itself, the less force the exigent circumstances argument keeps. This court has not but ought to decide how long may the police rely on exigent circumstances be-

fore they must obtain a warrant? In the present case at 9:00 a.m., the neighbor next to the home burgl zed provided the police with the des.ription of a black-over-yellow Buick which he had seen partially blocking his driveway at 1:00 a.m. The home invasion had occurred at 1:00 a.m. Once the police had the description of the car from Beltz, they broadcasted it on the police radio and posted it on the police bulletin board, but never sought and never obtained a search warrant for the car. A car which looked like the car seen by Beltz was observed at 3:00 p.m. and stopped after 4:00 p.m. During the more than seven hours from the time of Beltz's call until the stop, the police had ample time to obtain a warrant. The exigent circumstance doctrine may not

justify such a failure to get a warrant. COOLIDGE v. NEW HAMPSHIRE 403 US 443, 458 - 462, see PAYTON v. NEW YORK - U.S. - 63 Led 2d 639 at 648-649.

(B)

Even where exigent circumstances exist, the police must have probable cause to believe that the contents of the automobile offend against the law. CHAMBERS v. MARONEY 399 US 42 at 48-49, DYKE v. TAYLOR IMPLEMENT MFG.CO. 319 U.S. 216 at 221-111. In the present case there was no reasonable grounds to believe that the car contained proceeds from the burglary at the time it was stopped. The car was stopped more than 14 hours after the crime. On the afternoon when it was stopped, the police watched students put things into the car, but the police did not recognize any of the items being loaded as

proceeds from the burglary. In UNITED STATES v. DE RE 332 U.S. 581 the court observed "we are not convinced that a person by mere presence in a suspected car looses immunities from search of his person ....." By analogy when the car is suspect but there is no reason to suspect its contents, a search should not proceed without a warrant. c.f. YBARRA v. ILLINOIS - U.S. -, 62 Led 2d 238 at 245-246. This court has not squarely confronted the situation where the car is suspect, but the officers have no reason to believe that any of its contents are stolen. This case presents that opportunity.

(C)

The Illinois Appellate Court attempted to finesse the other search

and seizure issues presented by the record holding that the Petitioner's arrest was supported by probable cause. A warrantless arrest by police is a violation of the 4th Amendment unless they have reasonably trustworthy information to warrant a prudent man in believing that the Petitioner had committed or was committing an offense BECK v. OHIO 379 U.S.-89 at 91. The arresting officers admitted that they did not see the Petitioner violate any law. The sole facts relied on by the Appellate Court to uphold probable cause where: "Fifteen hours later, a car fitting the description was seen parked on the south side of an ISU dormatory. An officer observed three young men loading items into the automobile." PEOPLE v. PERRY

81 Ill App 3d 422, 37 Ill. Dec 170, 401 NE2d 1263 at 1269. When the police see students loading things into a car beside a college dormatory, and none of the things loaded are identified as proceeds from a burglary which occurred 15 hours earlier, the fact that the car looked like the car seen at the burglary does not give the police reasonable grounds to believe that the person driving the car away from the dormatory was a burglar. The state failed to prove that the arresting officers had sufficient knowledge of facts concerning the Petitioner to support his arrest. If the arrest was without probable cause, then a fruits of search incident to that arrest or occurring because of the arrest must be suppressed. BECK

v. OHIO 379 U.S. 89. While the lower court decision pays lip service to the standards adopted by this court, the substance of the decision is contrary to the probable cause requirement and warrants review by this court.

(D)

Even if we assume that the Appellate Court's holding that probable cause existed was correct, the search complained of was not "incident" to the arrest. As this court said in PRESTON v. UNITED STATES 376 U.S. 364, 367, "Once an accused is under arrest and in custody, then a search made at another place, without a warrant is simply not incident to the arrest." This doctrine was reaffirmed in UNITED STATES v. CHADWICK 433 U.S. 1 where the court held that the later search of a footlocker taken from

the trunk of a car but not opened until the arrestees were in jail could not be justified as incident to the arrest. The justification for a warrantless search of the area in the immediate control of the arrestee is to see that there are no weapons or destructable evidence near the person just arrested. 433 U.S. at 14-15. Those justifications disappear when the police have moved the automobile to a secure location in the police parking lot, and when the Petitioner is locked-up with no access to the vehicle. Just as in ARKANSAS v. SANDERS 442 U.S. 753 once the luggage to be searched is securely in police control, a search warrant should be required once the car is secure. No excuse for omitting to obtain a warrant

exists 442 U.S. at 763, 765. Some members of the court have suggested that the warrant needed before luggage from an automobile is searched does not involve the "automobile" exceptions to the requirement for a warrant. See concurring opinion of Chief Justice Burger in ARKANSAS v. SANDERS 442 U.S. at 766,768. A careful analysis of CHAMBERS v. MARONY 399 U.S. 42 does not create an "automobile" exception to searches conducted after and no longer incident to a lawful arrest: "the search of an auto on probable cause proceeds on a theory wholly different from that justifying the search incident to an arrest." 399 U.S. at 49. Since there was no probable cause to believe that the auto contained stolen goods, this case gives the court a chance to define some of the

fuzzy borders between CHAMBERS v. MARONEY 399 U.S. 42 and ARKANSAS v. SANDERS 442 U.S. 753 while reaffirming the search incident to arrest doctrine PRESTON v. UNITED STATES 376 U.S. 364

(E)

The final exception to the requirement for a warrant hinted at in the trial court by the State was that the search of the automobile in the police parking lot by the officers investigating the burglary was justified as an "inventory." (R.P. 85) This court's decision in SOUTH DAKOTA v. OPPERMAN 428 U.S. 364 should not be extended to justify the present search. That case upheld a routine inventory of the contents of a car impounded for parking violations. Dicta in the case also suggests that routine inventories of

cars seized as part of forfeiture proceedings may be lawfully undertaken to protect the car while in police custody. Mr. Justice Powell's concurring opinion in SOUTH DAKOTA v. OPPERMAN clarifies the distinction between searches intended to be part of criminal investigations and routine applications of the policy that all vehicles impounded or seized in forfeiture proceedings be inventoried. Warrants in criminal investigations place a neutral magistrate between the citizens expectation of privacy and the police desire to find evidence; inventory searches occur when the police are not looking for evidence but are only following a caretaking routine and are not exercising any judgment to justify the search

428 U.S. at 383. In the present case the search of the car in the police parking lot was a part of the ongoing criminal investigation. Detective Keim, in charge of this burglary investigation, stood by the car with the incident report from the home invasion in hand, while Lt. Kemp read the serial numbers of stereo equipment to the detective so that he could compare the numbers on the equipment in the car with the serial numbers of the stereo equipment taken from the house. Calling the search an "inventory" cannot hide the fact that its purpose was a search for evidence of a crime. The state failed to prove that there was anything routine about this search. The court should grant Certiorari to clarify the limits of SOUTH DAKOTA v.

OPPERMAN 438 U.S. 364.

II

White against Black - ugly racial hostility permeated the trial. White victims testified against unidentified Blacks invading their homes at night. An all White jury convicted the Black defendant and the White Judge sentenced him to 20 years.

Perhaps a jury with some students and some Blacks would have responded to the racial overtones of the trial with more sophistication and balance.

In TAYLOR v. LOUISIANA 419 U.S. 522 (1975) and DUREN v. MISSOURI 439 U.S. 357 (1979) this court explained that the 6th and 14th Amendments require that juries must be drawn from a source fairly representative of the community:

> "jury wheels pools of names, panels or venires which juries are drawn must not sys-

tematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." 419 U.S. at 538 quoted at 439 U.S. at 363-364.

DUREN v. MISSOURI explained:

"In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and rea-

> sonable in relation to the number of such persons in the community and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

This court has not decided but ought to decide whether students are a distinctive group in the community for Sixth Amendment purposes. In ANDERSON v. CASSCLES 531 F2d 682 (2nd Cir. 1976) the U.S. Court of Appeals relied on two New York State Court decisions and held that "the exclusion of students over the age of twenty one, . . ., would pose a substantial constitutional question which is not foreclosed by previous decisions of

this court." 531 F2d at 686. The Court of Appeals for the Seventh Circuit in UNITED STATES v. DELLINGER 472 F2d 340 (7th cir. 1972) observed: "We view the underrepresentation on voter lists of younger residents, and thus of any relevant attitudes which may be more prevalent among younger than older residents as a reason why it is desirable to seek feasible ways to supplement the voter list (for Jury Selection) . . . " 472 F2d at 366. Courts in New York have held that students are a distinctive group in the community for Sixth Amendment purposes PEOPLE v. MARR 67 Misc. 2d 113, 324 NYS 2d 608 (1971); PEOPLE v. ATTICA BROTHERS 79 Misc. 2d 492, 359 NYS 2d 699 (1974).

At trial the Petitioner's counsel challenged the array on the grounds that the entire jury list on its face showed a complete absence of any college students (R.P. 99-100). In the college town of Bloomington-Normal, the home of a major State University (ISU), the complete absence of students shows underrepresentation. The verified post-trial motion showed that Bloomington-Normal had a population of 71,000 and that Illinois State University had an enrollment of 17,000 to 20,000 students: a group comprising 20% of the town population was not represented.

The use of voter lists in selecting jurors is required by Ill. Rev. St. at ch78§1. When the board selecting jury lists knows of student

enrollment lists but chooses to use the voter lists with the underrepresentation that the voter list contains, the exclusion of students becomes intentional and the Statute is unconstitutional as applied to rural counties with large college populations.

The exclusion of students becomes even more important when the racial composition of the student body differs from the rest of the county.

The Appellate Court held that it was under no duty to consider the violation of defendant's 6th and 14th Amendment Rights because the motion and offer of proof were oral rather than written. In HENRY v. MISSISSIPPI 379 U.S. 443 13 L.Ed 2d 408, 855 S.Ct.564 (1965) this court held that a litigant's procedural defaults in State proceedings

do not preclude vindication of his federal rights unless the State's insistence in compliance with its procedural rules serves a legitimate State interest. When the substance of the defendant's challenge was presented to the trial court orally as soon as defense counsel saw the jury list showing the absence of students from the pool from which the jury was to be drawn, there was NO legitimate State interest to be served by making the defendant write his motion or present a written affidavit. The requirement for a sworn statement supporting the motion would have been satisfied in substance by permitting defense counsel to call the Clerk of the Court as a witness. The substance of defendant's position was presented in a timely fashion. Requiring a written motion exhalts useless form over vital constitutional rights

to a jury trial.

For the foregoing reasons, the Petitioner asks the Court to grant Certiorari and review the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX I

COPY OF THE ORDER OF THE
SUPREME COURT OF ILLINOIS

(Letterhead of)

ILLINOIS SUPREME COURT
Clell L. Woods, Clerk
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

September 29, 1980

No. 53327 - People State of Illinois, respondent, vs. Dennis Perry, Jr., petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

APPENDIX IIA - COPY OF THE OPINION OF ILLINOIS APPELLATE COURT

401 N.E. 2d 1263
81 Ill.App. 3d 422
37 Ill. Dec. 170

THE PEOPLE OF THE STATE OF ILLINOIS
Plaintiff-Appellee,
v.
DENNIS PERRY,JR., Defendant-Appellate
No. 15722

Appellate Court of Illinois,
Fourth District.

Feb. 29, 1980.

MILLS, Presiding Justice:

CHARGES: Armed robbery, home invasion, burglary, and felony theft.

JURY: Guilty

JUDGE: 20 years, concurrent.

THIS COURT: Affirm.

A jury trial resulted in defendant's convictions for three counts of armed robbery, one count each of home invasion, burglary, and felony theft. He was sentenced to 20 years for each armed robbery charge,

20 years for home invasion, 7 years for burglary, and 5 years for the theft - all to run concurrently. He raises eight issues on appeal.

But first, a brief review of the facts.

The incident in question occurred in the early morning hours of December 18, 1978, at a residence at 216 South Coolidge in Normal, Illinois. Three of the five occupants were in the home asleep at 1:20 a.m. when the doorbell rang. One of the residents, Ronald Sobkoviak, answered the call and encountered a thin black man, who asked for "Dan."

Daniel Flick was summoned, at which time the black man and several others forcibly entered the dwelling. In the next 15 to 20 minutes, the res-

idents were threatened, beaten, cut, held at gunpoint, and robbed. Due to the lighting conditions, the residents were unable to identify the perpetrators but they were able to tell that one wore an Army fatigue jacket and that three different types of shoes were worn: blue tennis shoes with white stripes, hiking boots, and black dress shoes. A number of items which were taken by the intruders were identified at trial, including a Pioneer stereo amplifier and an Illinois State University class ring bearing the inscription "Greg Burmeister."

Martin Belz, the next-door neighbor of the victims, upon hearing of the event, informed police that he had seen a black over light yellow Buick equipped with amber colored lenses over the brights, and an object hanging from the rearview

mirror. The automobile was outside his residence at the time of the offense.

This vehicle was spotted by an Illinois State University police officer at 4:24 p.m. outside the Waterson Towers dormitory. The officer observed four men loading items into the auto. As the auto left, it was stopped by ISU and Normal police officers. The defendant was the driver of the auto and the Pioneer stereo amplifier was seen on the front seat. After defendant consented, the officers searched his dorm room and found the class ring. They also recovered an Army fatigue jacket and a pair of blue tennis shoes with white stripes. At trial, defendant stated that he had spent the entire evening in question with his

girlfriend, Pamela Pharms, in her dorm room. He stated that he purchased the amplifier and ring from a man named "Bob" in a parking lot for $60. He borrowed the automobile from a friend to use while moving between dormitories.

1. REASONABLE DOUBT

The defendant initially submits that in light of the fact that all of the evidence of guilt was circumstantial and the fact that there existed unrefuted alibi evidence, he was not proved guilty beyond a reasonable doubt. Defendant cites a number of cases wherein the appellate court has reversed convictions due to failure to prove guilt beyond a reasonable doubt. PEOPLE v. MOORE (1973), 12 Ill.App.3d 78, 298 N.E.2d 202; PEOPLE v. CLAUDIO (1971), 3 Ill.App.3d 309,279 N.E.2d 39; PEOPLE v. ADAMS (1969), 115 Ill. App.2d 360,253 N.E.2d 23.

We are not persuaded.

[1,2] To support a conviction upon circumstantial evidence, it is only necessary that the proof of circumstances be of such a conclusive nature and tendency as to lead on the whole, to a satisfactory conclusion and to produce a reasonable and moral certainty that the accused, and no one else, committed the crime. (PEOPLE v. MARINO (1970), 44 Ill2d 562, 256 N.E.2d 770.) It is essential that the facts proved be not only consistent with defendant's guilt but also inconsistent with any reasonable hypothesis of innocence. The State is not, however, required to establish guilt beyond the possibility of a doubt.

PEOPLE v. BRANION (1970), 47 Ill.2d 70,77,265 N.E.2d 1,5 Cert. Denied (1971), 403 U.S. 907, 91 S.Ct. 2213, 29 L.Ed. 2d 683.

[3] In the instant case, the defendant was the operator of an automobile which matched the description of the one at the scene. He possessed blue tennis shoes with white stripes and a green Army fatigue jacket - both no different from those worn by the perpetrators. Finally - the most incriminating circumstance - he was in possession of the spoils of the offense. Recent, exclusive, and unexplained possession of stolen items may give rise to an inference of burglary and armed robbery, and is sufficient to sustain the conviction unless overcome by facts or circumstances which create a reasonable

doubt. PEOPLE v. FRANCESCHINI (1960), 20 Ill.2d 126, 169 N.E.2d 244; PEOPLE v. BULLOCK (1977), 51 Ill.App.3d 149,9 Ill.Dec. 218, 366 N.E.2d 475.

[4] Defendant strenously points to the unrefuted alibi evidence. As noted above, defendant testified that he spent the entire evening with Pamela Pharms. Pharms corroborated this statement and another resident of the floor, Tina Holmes, stated that she saw the defendant on the dorm floor on the night in question. The State offered no evidence to refute this testimony. The jury was not, however, required to believe the alibi evidence, even though it was unrefuted. PEOPLE v. GRICE (1978) 60 Ill.App. 3d 7, 17 Ill.Dec. 284, 376 N.E.2d 283.

We further note that there were sufficient questions raised so as to discredit the corroboration of defendant's alibi. Holmes stated that she saw defendant between 7 p.m. and 12 p.m. on the night of December 17, 1978. She stated that she did not see defendant enter Pharms' room and that she would not have known if defendant had left the floor. Since the instant offense was committed sometime after 1 a.m., the testimony of Holmes was of little probative value.

The credibility of Pharms was also questioned. Pharms stated that she did not know whether she loved defendant or whether she hoped to marry him. The prosecution then introduced a copy of the letter Pharms

had written in 1978 stating that she loved defendant and hoped to marry him. Clearly she was not a disinterested witness.

[5] Under the facts and circumstances of this case, the jury could have properly determined that defendant was guilty beyond a reasonable doubt, and we will not substitute our judgment for that of the jury.

II. NEWLY DISCOVERED EVIDENCE

Defendant made a motion for a new trial which was accompanied by an affidavit signed by Kevin Marshall, stating that he was a witness to the transaction between defendant and the man named "Bob." The affidavit stated that he did not come forth earlier because he was afraid of retaliation from "Bob." Since the

time of trial, Marshall had learned that "Bob" had been killed in Chicago.

[6] To award a new trial in the basis of newly discovered evidence, the new evidence must be of such a nature that it would probably change the result on retrial; must be material to the issue and not merely cumulative; and must be of such a nature that it could not have been discovered prior to trial by the exercise of due dilligence. PEOPLE v. TORRES (1977), 47 Ill.App.3d 101, 5 Ill.Dec. 480, 361 N.E.2d 803.

[7] Of the above requirements, one of these has not been met: Defendant has not shown due diligence in obtaining Marshall's testimony. At trial, defendant stated that there were a number of other people

who had observed the transaction with "Bob." He had seen these people around but did not know them personally. Defendant, when asked if he had ever tried to locate the other individuals, replied negatively.

The trial court correctly denied the motion for a new trial.

III CROSS-EXAMINATION - PRIOR CONVICTIONS

On direct examination, defense counsel asked the defendant about his prior convictions for forgery.

"Q. And could you tell us, please, what, if any, problems you had last year with the law?

A. I wrote two bad checks, one for $14 and one for $41.

Q. And what happened after

that?

A. I pleaded guilty to it.

Q. To what offense, please?

A. To forgery.

Q. And did you contest those charges?

A. No, I didn't.

Q. What is your plea in this case, Mr. Perry?

A. Not guilty."

On cross-examination, the trial court allowed the State, over defendant's objection, to elicit from defendant that his guilty plea was pursuant to a plea agreement. Defendant now claims that this constitutes reversible error.

[8] While proof of a prior conviction offered to discredit the testimony of the accused may only be done by introduction of a prior record and not

cross-examination (PEOPLE v. DONALDSON (1956), 8 Ill.2d 510, 134 N.E.2d 776), the prosecution's examination in this case was not improper.

[9] As noted above, the fact of a prior conviction was brought out on direct examination by defense counsel. Additionally, the manner of questioning employed on direct examination indicates that defense counsel was trying to infer innocence on the present charges by the fact that defendant had pleaded guilty to other charges. This was highly improper (See PEOPLE v. BELVEDERE (1979), 72 Ill.App.3d 998,28 Ill.Dec. 649, 390 N.E.2d 1239), and the State's Attorney was entitled to refute this inference by establishing the plea agreement.

IV. JURY ARRAY

Defendant, relying upon the Supreme Court's decision in TAYLOR v. LOUISIANA (1975), 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690, and DUREN v. MISSOURI (1979), 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579, also argues that the trial court erred in refusing a hearing on defendant's challenge to the array of prospective jurors from which Illinois State University students had been excluded.

In TAYLOR, the court held unconstitutional a Louisiana statute which provided that women were not selected for jury duty unless they previously filed a written declaration of their desire to serve. In DUREN, the court struck down a Missouri statute which provided an automatic exemption from jury service

for any woman requesting not to serve.

[10] Defense counsel, in the instant case, made an ORAL challenge to the jury array. The trial court denied the motion, noting that the motion must be presented in WRITTEN form and accompanied by supporting affidavits.

The trial court correctly stated the law and was under no duty to conduct a hearing on defendant's oral motion. Ill Rev.Stat. 1977, ch. 38, par. 114-3(b); PEOPLE v. HUGHES (1977), 46 Ill.App.3d 490, 4 Ill Dec. 930, 360 N.E.2d 1363.

V. REBUTTAL

Defendant claims that reversible error occurred during the State's rebuttal to defendant's case.

We disagree.

[11] Prior to trial, defendant informed the police that he had bought the ring and amplifier from a guy named "Bob" who entered Building A of Hillside Apartments. At trial, however, defendant stated that "Bob" entered Building E. On rebuttal, the State called the officer to whom the previous statement had been given. Robert Thicklen was also called to testify that he lived in Building A and that he did not sell the stereo equipment to defendant. On surrebuttal, defendant testified that Thicklen was not the "Bob" who had sold him the amplifier.

Defendant claims that the State's use of Thicklen's testimony was reversible error. The error in allowing the testimony was one of relevancy.

Thicklen's testimony did not contradict any evidence presented on defendant's case and therefore was not proper rebuttal. The only effect which Thicklen's testimony could have had was to establish that defendant's prior statement to the police was incorrect.

While it was error to allow Thicklen's testimony, an examination of the record - especially in light of defendant's testimony on direct examination and on surrebuttal - reveals that Thicklen's testimony was virtually devoid of probative value. Clearly the error was harmless in this cause.

VI. MOTION TO SUPPRESS

Defendant also claims that it was error for the trial court to deny his motion to suppress evidence found in the automobile and in his dormitory room

as fruits of an illegal arrest. (Both searches and the arrest were made without warrants.)

[12,13] A person may be arrested without a warrant when probable cause exists to do so. Probable cause exists when the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a man of reasonable caution in believing that an offense has been committed and that the person arrested has committed the offense. The police need not have evidence against the defendant sufficient to sustain conviction. (PEOPLE v. ROBINSON (1976), 62 Ill.2d 273,342 N.E.2d 356.) Whether or not probable cause for an arrest exists in a particular case depends upon the totality of the facts and circumstances known to the officers at the

time of the arrest. PEOPLE v. CLAY (1973), 55 Il12d 501,304 N.E.2d 280.

[14] In the instant case, the officers had received a report from Belz stating that a black over yellow Buick with amber headlights and a decoration hanging from the rearview mirror blocked the driveway next to 216 South Coolidge at the approximate time of the offense. Fifteen hours later, a car fitting the description was seen parked on the south side of an ISU dormitory. An officer observed three young men loading items into the automobile. Under the facts of this case, the trial court's conclusion that probable cause existed was not manifestly erroneous. CLAY.

[15] Defendant also contends that probable cause was lacking because the police did not take actions to verify

the statements made by Belz or to check his reliability. We note that in this case the informant was a private citizen and not a paid professional. As such, the officers were justified in relying upon his information without independent verification or examination of his reliability. See PEOPLE v. HOFFMAN (1970), 45 Ill.2d 221, 258 NE2d 326, cert. denied (1970), 400 U.S. 904, 91 S.Ct. 142, 27 L.Ed.2d 141; PEOPLE v. FISHER (1979), 76 Ill.App. 3d, 331, 32 Ill.Dec. 107, 395 N.E.2d 54.

VII. INTRODUCTION OF EXHIBITS

Defendant next argues that the introduction of 25 items of burglary proceeds which had not been connected to defendant was error and that cer-

tain other items - defendant's shoes, jacket, knife, and gun grip - were irrelevant and should have been excluded.

[16-19] Evidence is admissible where it fairly tends to prove the offense charged and any circumstances may be put in evidence which tend to make the proposition at issue more or less probable. Physical evidence may be introduced where there is proof to connect the evidence to defendant and the crime. (PEOPLE v. FAIR (1977), 45 Ill.App.3d 301, 4 Ill. Dec. 15, 359 N.E.2d 848.) Admissibility does not require a showing that the evidence was actually used in the offense charged as long as it is shown that the object is at least suitable for the commission of the crime.

(PEOPLE v. MEEKS (1978), 59 Ill.App. 3d 521, 16 Ill.Dec. 844, 375 N.E.2d 1001.) The propriety of receiving demonstrative evidence rests primarily within the discretion of the trial judge and the exercise of that discretion will not be interfered with absent an abuse which prejudices the defendant. FAIR.

[20] It was not error to allow the introduction of defendant's shoes, jacket, knife, and gun grip. The victims of the offenses stated that the shoes and jacket, while not having any distinguishing characteristics, were in no way different from those worn by the perpetrator. Additionally, there is no question that the perpetrators were armed with at least one gun and one knife. The

common nature of these items affects the amount of weight given to the fact that they were found in defendant's possession but does not make them inadmissible.

[21] Likewise, we do not agree that the admission of items not found on defendant constituted reversible error. At trial the jury was not told where the prosecution obtained these items. The defendant on direct examination denied ever seeing the items. Under the facts of this case, defendant has not shown any prejudice due to the admission of this physical evidence. PEOPLE v. HOUCK (1977), 50 Ill.App.3d 274, 8 Ill. Dec. 338, 365 N.E.2d 576.

VIII. CONSTITUTIONALITY OF CLASS X LEGISLATION

[22] Finally, defendant asserts that Class X legislation (Public Act 80-1099, effective February 1, 1978) is unconstitutional. It is claimed that by making all sentences determinative, eliminating the prison review board's discretion in granting parole release and by requiring minimum mandatory sentences, the legislature has effectively abandoned rehabilitation as an objective of sentencing. Defendant notes that article I, section 11, of the Illinois Constitution of 1970 provides that all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender

to useful citizenship.

The fallacy of defendant's position is that it is based on the assumption that early release and parole are the only means of rehabilitation. This is a position we are not prepared to espouse. The methods of rehabilitating the criminal offender have been the subject of considerable, diverse discussion. We feel that this is a question peculiarly suitable for legislative investigation, analysis, and action. We do not feel that Public Act 80-1099 has abandoned the concept of rehabilitation.

Affirmed.

CRAVEN and WEBBER, JJ., concur

COPIES OF THE OPINIONS,
ORDERS AND FINDINGS
OF THE CIRCUIT COURT OF
MCLEAN COUNTY, ILLINOIS

Rulings on Motion to Suppress

THE COURT: Well, this of course, is a matter of a Motion to Suppress evidence because it was seized illegally. First of all in connection with Mr. Belz, the Court finds that the circumstances in connection with his observations that he made and from where they were made, give rise to the inference that Mr. Belz is a private citizen and as such, presumse to be reliable in communicating information to the police in circumstances such as this. Court further finds that the information which originated with Mr. Belz was relayed among the various police officers of the department of the I.S.U. Police Department and the Normal

Police Department, disseminated to various units of those police departments and among those who received the information were the officers who testified here today; from the information that officer knew because of that, from the observations that were made by the officers which observations indicated that the automobile which was sighted by the I.S.U. police officer who testified, matched the description of the automobile in which was used in the incident, and from the observation of the officer of the individuals loading articles and items into the automobile, the Court finds there is probable cause to believe that the contents of the automobile seized and further that the search of the automobile was made at the premises or at

the time of the stopping of the automobile and later at the police department was incident to a lawful arrest. In connection with the search of the defendant's room, the Court finds that there was a voluntary, willing consent given by the defendant to the police officer for the search, and though no promise was made to the defendant to the consent that he gave, therefore, it is the opinion of the Court that the Motion to Suppress the evidence should not be allowed. The Court will deny the Motion to Suppress.

RULING ON CHALLENGE OF THE ARRAY

THE COURT: Well, this motion is now made orally, and it is the Court's understanding such a motion is appropriately made in writing supported by an affidavit and burden of proof. With regards to the challenge to the array upon the motion, I believe it can be concluded upon examination of the list of prospective jurors whether or not there are any students from the university who make up a part of the particular group of prospective jurors, and whether in any event that would be a proper challenge to the array.

RULING ON DEFENDANT'S POST TRIAL MOTION

THE COURT: Thank you. Gentlemen, the Court has previously to the hearing today, reviewed the Motion for a New Trial that was filed a number of days ago. So the Court has had an opportunity to review that, and the Court has now received and considered the Affidavit submitted today by the Defense Counsel, and now had the benefits of the argument and suggestions of counsel. I think the Court is prepared to rule on the Motion for New Trial.

First of all in regard to the matter of the newly discovered evidence and the situation as to a possible change in the result or outcome of the trial. The main thrust of the Defense in this case was, of course, alibi; that being that

the defendant was with a young lady at the time of the incident. That aspect of the Defense, the alibi which was provided by the defendant's testimony also supported by other witnesses and apparently was rejected by the jury. In regard to the matter of the diligence is essentially correct and that due diligence has not been demonstrated in regard to the propcsed new evidence.

The Motion refers to a number of other matters, rulings on motions by the Court before and during the trial. It also refers to various evidentiary rulings made by the Court during the trial. The Court is of the opinion that the rulings on those matters by the Court were correct. The other matters referred

to in the motion including the unconstitutional nature of the Statute or home invasion, the Court feels are not well taken. And the Court is of the opinion that there was sufficient evidence to warrant the conviction in this case, and that the defendant was proven guilty beyond a reasonable doubt.

Therefore, it is the Court's opinion that the Motion for New Trial should not be allowed, and the Court will, therefore, deny the Motion for New Trial.

OVERRULE OF OBJECTION TO THE ADMISSIONS OF ILLINOIS SEIZURE EVIDENCE

MR. STEVENS: Number 3, I will only renew my Motion to Suppress objection, which I am not waiving.

THE COURT: That is the amplifier, right. I will admit that.

APPENDIX III

The Order of the Supreme Court as Quoted in its Entirety in Item I of the Appendix (page A1 of Appendix).

No. 80-870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DENNIS PERRY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the warrantless search of an automobile at the police station after petitioner's arrest and after an officer had driven the vehicle to the police station violated petitioner's Fourth Amendment rights:

a) Whether police officers after effecting petitioner's arrest and driving petitioner's vehicle to the police station may examine articles in the interior of the car without first obtaining a warrant.

b) Whether police who have a description of a suspect vehicle but who have not yet located the vehicle are required to obtain a John Doe search warrant on the supposition that the vehicle will be located during the period in which the warrant may be executed.

c) Whether police who have a description of a suspect vehicle, a method of operation, and a description of stolen articles who spot a vehicle matching the description, observe conduct indicative of the method of operation and see similar articles visible in the car's interior upon stopping the vehicle, have probable cause to arrest the occupant and search and seize the articles.

(2) Whether the trial court's refusal to hold a hearing on petitioner's challenge to the array of prospective jurors because of petitioner's procedural default violated petitioner's Sixth and Fourteenth Amendment rights.

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IN THE

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OCTOBER TERM, 1980

DENNIS PERRY,

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vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

Respondents admit jurisdiction under 28 U. S. C. § 1257(3) to all questions excepting that portion of Argument I pertaining to inventory search. Since petitioner failed to raise that question in the Illinois Appellate Court and it was not, therefore, considered by that Court, respondents contend this Court is without jurisdiction as regards that question. 28 U. S. C. § 1257(3).

CONSTITUTIONAL PROVISIONS

The petitioner adequately sets forth the constitutional provisions involved in this cause.

NATURE OF THE CASE

Three Illinois State University students were assaulted and robbed during the course of a home invasion on December 18, 1978, shortly after 1:00 a.m. (Tr. 216, 265-266, 272, 273) Because of darkness, only the perpetrators' coats and shoes could be identified by the victims. The victims' next door neighbor provided police with a description of a vehicle blocking his driveway when he arrived home at 1:00 a.m. or 1:30 the morning of December 18th. He informed police that he observed four individuals carrying items to the car. (Tr. 327) The suspect vehicle was observed by police at 4:24 p.m. on December 18. (Tr. 333) Officers later stopped the automobile and saw stereo equipment and speakers in the interior. (Tr. 43). The suspect vehicle was driven to the police station and when officers inventoried the amplifier found in the car they discovered its serial and model numbers matched the amplifier taken in the home invasion. (Tr. 44)

The defendant gave officers permission to search his dorm room (Tr. 46-47), where officers found one of the victims' class ring (Tr. 361) and shoes and jacket that matched the victims' description of their assailants. (Tr. 354)

Defendant was arrested approximately 17 hours after the home invasion was reported to police. (Tr. 53)

After a jury trial, defendant Dennis Perry was convicted for three counts of armed robbery, and one count each of home invasion, burglary, and felony theft. He was sentenced to 20 years for each armed robbery charge, 20 years for home invasion, 7 years for burglary, and 5 years for theft, all to run concurrently. From the judgments of conviction defendant appealed to the Illinois Appellate Court. After an affirmance, Perry petitioned the Illinois Supreme Court for leave to Appeal. Leave to Appeal was denied. Perry now petitions this Court for a Writ of Certiorari.

STATEMENT OF FACTS

Search Of Petitioner's Car At Police Station After Petitioner's Arrest

At 1:00 a.m. on December 18, 1978, Ronald Sobkoviak, a student at Illinois State University, went downstairs to bed in a bi-level he occupied with four other students at 216 S. Coolidge in Normal, Illinois. (Tr. 216) Two other occupants were also home asleep when the doorbell rang at 1:20—1:30. Mr. Sobkoviak went to the door and encountered a thin black man, who wore a green army fatigue jacket. He asked for "Dan." (Tr. 23)

Mr. Sobkoviak went to tell his roommate, Daniel Hick, that there was a man looking for him and returned to his room. (Tr. 231) Mr. Hick went to the door. (Tr. 260) When he opened the door, the man drew a gun and forced entry. (Tr. 261) Several other individuals also entered. (Tr. 262)

Mr. Hick was forced down the stairs. One man got on top of him (Tr. 263), held a knife to his back and threatened to cut him. (Tr. 265, 266) When Ronald Sobkoviak heard the scuffle he walked out of his room and saw a black man with a gun. He was not as tall or as slim as the man who had rung the doorbell, but because it was fairly dark Mr. Sobkoviak could not see any of his features.

The man ordered Mr. Sobkoviak back to his room, where he pushed him into bed and told Sobkoviak he was going to kill him. (Tr. 234) Daniel Hick was brought into Sobkoviak's bedroom. (Tr. 265) Mr. Hick was cut in the neck and his face was slammed into the floor with enough force to break two bottom teeth. (Tr. 267)

The other roommate present that evening, Greg Burmeister, was brought to Sobkoviak's bedroom by gunpoint and told to lie flat on his face. (Tr. 235)

Next, the man on top of Sobkoviak asked for his wallet and took the cash. (Tr. 236) Sobkoviak heard people in the other bedrooms and a noise like the rooms were being ransacked. (Tr. 238)

The men ordered the roommates to crawl to Dan's room. (Tr. 238) When the man concluded that they could not force the roommates to crawl under the waterbed, they ordered the roommates to crawl into Greg's room. (Tr. 239) Dan was thrown into the closet and Greg and Ron were forced under the bed. (Tr. 241)

At one point, the intruders turned on the lights for two to three minutes. (Tr. 242) From beneath the bed, Sobkoviak could see three pairs of shoes: a pair of blue tennis shoes with white slanted stripes, a pair of high-heeled black dress shoes with rounded, square toes, and a pair of hiking boots with thick shoelaces. (Tr. 241-242)

Greg also noticed that one man was wearing blue tennis shoes with white stripes (Tr. 302) and identified an army fatigue jacket as similar to the coat one of the intruders wore. (Tr. 304)

The intruders left the room, leaving a man to stand guard. Sobkoviak heard noises like the house was being ransacked. The intruders discussed whether to kill the roommates. Then, nothing was heard. (Tr. 243) Approximately 15 or 20 minutes elapsed from the time the intruders arrived, threatened, beat, cut, held at gunpoint and robbed the roommates to the time when the intruders left. (Tr. 244)

Sobkoviak went to his room and found that it, like the other rooms, was in shambles. (Tr. 244) Besides the cash taken from his wallet, he was also missing his checkbook. (Tr. 245) Mr. Flock was missing a Pioneer stereo amplifier, a McDonald clock and some silver dollars. (Tr. 272) He was to see those items the following day at the police station. Other items, such as a ring and necklace, he never saw again. (Tr. 273) Greg Burmeister testified that his amplifier in the living room was

missing. At the police station the following day he was to recover a class ring, belts, and a clock. (Tr. 307)

Martin Belz was the victim's next-door neighbor. He testified that when he came home around 1:00 or 1:30 a.m. the morning of December 18, 1978, an automobile was blocking his driveway. (Tr. 373) It was approximately a 1970 two door Buick, yellow with a black vinyl top, with amber headlight covers and a "lot of things" hanging from the rearview mirror. (Tr. 324) Later that morning, Mr. Belz heard his dogs bark and he looked out the window. He observed four individuals carrying items to the Buick. (Tr. 326) At 9:30 a.m. Mr. Belz notified police of his observations. (Tr. 327) A description of the car was put out to all local police departments. (Tr. 13)

A campus police officer spotted a suspect vehicle that matched the description at 4:24 p.m. outside the Waterson Towers domitory. The car was a 1968 yellow Buick, with a black vinyl top, amber headlight covers and a white tassel hanging on the rearview mirror. (Tr. 333) He radioed the police who sent two officers to observe the car. (Tr. 343) They observed a black male get into the car and pull it in front of Waterson Towers. Two other black males helped the defendant load items into the back and trunk of the car. (Tr. 23) Two subjects got into the car and pulled away. (Tr. 344) The officers followed (Tr. 344) and stopped the car near Beaufort and Vernon. Defendant was driver of the car. (Tr. 345)

Defendant left the stopped automobile and walked towards the squad car. He and his passenger, Maxine Mors, were patted down and handcuffed. The officers checked the interior of the car and found stereo equipment and speakers. Miscellaneous items were in the trunk. An officer drove the suspect vehicle to the police station. (Tr. 43) The officers inventoried the Pioneer amplifier found in the automobile and discovered it had the serial and model numbers of the amplifier taken in the home invasion. (Tr. 44)

Defendant was read his *Miranda* rights. (Tr. 349-350) He explained that a man named Bob at Hillside Apartments had asked him if he wanted to buy an amplifier and class ring. The officers asked defendant if he would let them search his dorm room. He gave the officers permission. (Tr. 46-47)

The dorm room was searched and officers found the class ring. (Tr. 361) They also recovered a green army fatigue jacket and pair of blue and white tennis shoes. (Tr. 354)

Defendant was arrested approximately 17 hours after the home invasion was reported to the police department. (Tr. 53)

At trial defendant testified that he had spent the entire evening in question with his girlfriend, Pamela Pharms, in her dorm room. (Tr. 379-380) He stated that the amplifier and class ring were purchased from a man named "Bob" in a parking lot for $60. (Tr. 384-385) He had borrowed the car from a friend to use while moving between dormitories. (Tr. 386, 387)

Jury Selection

Prior to trial, defense counsel challenged the jury array on the grounds that it appeared Illinois State University students were excluded from the venire. (Tr. 99) The trial court noted that the motion was made orally and that it was the court's understanding that "such a motion is appropriately made in writing supported by an affidavit and burden of proof."

The court stated that it believed it could be concluded upon examination of the list of prospective jurors whether there were any students from the university who made up the jury pool and whether it would be a proper challenge to the array. The court denied the motion. (Tr. 100)

Voir dire was held and the jurors were sworn. (Tr. 101-196)

I.

CERTIORARI SHOULD BE DENIED BECAUSE DECISIONS OF THIS COURT CLEARLY ESTABLISH THAT THE FAILURE OF THE OFFICERS TO OBTAIN A SEARCH WARRANT PRIOR TO EXAMINING A STEREO AMPLIFIER WHICH WAS ON THE FRONT SEAT OF THE AUTOMOBILE PETITIONER HAD BEEN DRIVING PRIOR TO HIS ARREST DID NOT VIOLATE PETITIONER'S FOURTH AMENDMENT RIGHTS.

On December 18, 1978, shortly after 1:00 a.m. several students at Illinois State University were awakened from their beds and subjected to a brutal and terrifying home invasion. During the course of the home invasion, one student was held facedown at gunpoint and his life threatened; another student was held facedown with a knife held to his back, threatened, cut and had two teeth broken. The perpetrators of these crimes removed many articles from the apartment, including jewelry, money and stereo equipment. Due to the dark conditions, however, the students were unable to describe their assailants to the police, except to state that the assailants were black and that one wore blue tennis shoes with white-slanted stripes, another wore high-heeled black dress shoes with rounded, square toes and the third wore a pair of hiking boots with thick shoelaces.

A next-door neighbor, Martin Belz, notified the police at 9:30 a.m. on December 18, 1978 that he had observed an automobile blocking his driveway shortly after 1:00 a.m. Sometime later Mr. Belz's dogs had barked; he had looked out the window and observed four (4) individuals carrying items to the automobile. Mr. Belz described the automobile to police as approximately a 1970 Buick, two door, yellow with a black vinyl top, amber headlight covers and a "lot of things" hanging from the rearview mirror. A description of the car was put out to all local police departments.

At 4:24 p.m. campus police spotted a 1968 yellow Buick, black vinyl top, amber headlight covers and a white tassle hanging on the rearview mirror. The vehicle was parked outside a college dormitory. The campus police radioed city police who sent two officers to observe the car. They observed a black male get into the car and pull it in front of the dormitory. Two other black males helped petitioner load items into the car. The three got into the car and drove away. The officers then stopped the vehicle. Petitioner was the driver. Petitioner and a passenger were arrested and transported to the police station. The officers observed stereo equipment in the interior of the car. An officer drove the suspect's vehicle (i.e. the 1968 yellow-black Buick) to the police station. Once at the police station the officers discovered that the serial and model numbers of the amplifier located on the front seat of the suspect vehicle matched the numbers of the amplifier taken in the home invasion.

Petitioner seeks certiorari upon an alleged Fourth Amendment violation involving the failure of the officers to obtain a search warrant prior to searching petitioner's automobile. Petitioner's contentions are: (1) that since 7½ hours elapsed between the time police were given a description of the car and the time the car was stopped, the officers had ample time to obtain a search warrant for the car; (2) that the officers had no reasonable grounds to believe that the car contained stolen goods, contraband or evidence of a crime and, therefore, had no authority to conduct a warrantless search of the automobile; (3) the officers did not have sufficient probable cause to effect petitioner's arrest; (4) since the search of the automobile occurred after petitioner had arrived at the police station, the search could not be justified as incident to arrest; (5) the warrantless search of the automobile cannot be justified as an inventory search. For all the reasons hereinafter stated, certiorari should be denied.

The Warrantless Search Of the Vehicle At The Police Station Was Proper

The factual situation and issues raised in this case bear striking similarity to *Chambers* v. *Maroney,* 399 U. S. 42 (1970). In *Chambers* a description of a vehicle in which robbers had escaped the scene was broadcast over the police radio. Shortly thereafter, officers encountered a vehicle fitting the description of the escape vehicle. They arrested the driver and its passengers and took the automobile to the police station. The car was searched and evidence of the robbery was discovered concealed in a compartment beneath the dashboard. In sustaining the warrantless seizure of the vehicle and its subsequent warrantless search, this Court said:

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater". But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend upon a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment. 399 U. S. at 51-52.

Hence, the issue upon which petitioner seeks certiorari, that is, whether the officers should have delayed the search of petitioner's vehicle at the police station and after petitioner's arrest until they had obtained a warrant was settled in *Chambers* v. *Maroney, supra. See also Texas* v. *White,* 423 U.S. 67 (1975) (probable cause factor developed at the scene still obtains at the station house), *Carroll* v. *U.S.,* 267 U.S. 132 (1925).

In a related contention petitioner contends that since 7 1/2 hours elapsed between the time the police learned the descrip-

tion of the suspect vehicle from Belz and the time they actually spotted the vehicle, the police had ample time to and should have obtained a search warrant for the car. (Petition, 30-31). Petitioner attempts to liken these facts to *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971) in support of the contention that police officers in such situations should be required to obtain warrants. Respondents contend that certiorari should be denied because *Coolidge* is distinguishable and the argument is otherwise without merit.

In *U.S.* v. *Blanton,* 520 F. 2d 907 (6th Cir. 1975) the Sixth Circuit Court of Appeals considered a similar argument. In that case defendant Blanton argued that since the FBI knew a week in advance that the car could contain contraband, they should have obtained a search warrant prior to the time they actually spotted the car. The Sixth Circuit distinguished *Coolidge* on the grounds that in *Coolidge* the officers had known the location of the car to be searched for several days, they had no reason to believe Coolidge's car would be moved to another jurisdiction, and had no reason to believe the car contained contraband. Substantively, the Court held that since the car had not been located in any particular spot the FBI agents could not be required to obtain a warrant, good only for a short time, on the chance that the car could be located within that period. Respondents submit that the Sixth Circuit's decision distinguishing *Coolidge* and refusing to require officers to obtain warrants on vehicles until the officers have at least located or observed the vehicle is correct, that petitioner's argument is without merit and that certiorari thereupon should be denied.

Additionally, petitioner contends that the officers lacked probable cause to arrest petitioner and lacked probable cause to believe that the car contained stolen goods, contraband or evidence of crime. As to the requisites of probable cause, this Court has stated:

> Probable cause exists where the facts and circumstances within [the officer's] knowledge and of which they have

> reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar* v. *U.S.*, 338 U. S. 160, 175 (1949) *citing Carroll* v. *U.S., supra.*

The arresting officers in this case, by this definition were certainly aware of sufficient facts and circumstances both to arrest petitioner and to believe that the stereo equipment visible in the car's interior was probably stolen. At the time of the arrest the officers had a description of the vehicle involved in the home invasion. The vehicle petitioner was driving matched that description. Mr. Belz, the next door neighbor had reported seeing 4 black males carrying articles from the students' apartment to the car during the home invasion. The officers observed 3 black males carrying articles from a college dormitory to a car matching the description of the home invasion suspect vehicle, loading the articles and driving away. Upon stopping the vehicle they observed stereo equipment in the car, and, specifically, an amplifier in the front seat. One of the victims of the home invasion had reported the loss of an amplifier. Hence, from the facts concerning the home invasion—the description of the suspect vehicle, number of participants, the method of operation and the target victims as students, and the nature of the property stolen—the arresting officers could reasonably believe that petitioner and his passengers were involved in the home invasion and that the amplifier in the front seat was fruit or evidence of a crime. *Colorado* v. *Bannister,* ____ U. S. ____, 101 S. Ct. 43 (1980), recently decided by this Court, so held. In *Bannister,* a police officer heard by radio dispatch that a theft of motor vehicle parts had occurred. The dispatch indicated that a number of chrome lug nuts were among the items stolen and described the two suspects. The officer had earlier observed a blue 1967 Pontiac GTO travelling at a speed above the legal limit but had lost sight of it. He saw the vehicle again, still speeding, and stopped it in order to issue a citation. As the officer approached, the

occupants got out of the car. A conversation ensued. During the conversation, the officer observed chrome lug nuts as well as two lug wrenches inside the car. Recognizing that the occupants met the description of the suspects in the recent theft of motor vehicle parts, the officer immediately arrested both occupants and seized the lug nuts and wrenches. This Court held that under these facts the officer had sufficient probable cause not only to effect the arrest, but, under *Carroll* and *Chambers,* probable cause to seize the incriminating items from the vehicle without a warrant. *Id* at 44. Respondents submit that petitioner's contentions regarding the officers' probable cause or lack thereof in the instant case were settled in *Colorado* v. *Bannister, supra* and that, therefore, certiorari thereupon should be denied.

Inventory Search

Petitioner also contends that the warrantless search of petitioner's vehicle after petitioner's arrest and after a police officer had driven the vehicle to the police station cannot be justified as an inventory because the officers were not inventorying the contents of the vehicle, but rather were continuing to pursue a criminal investigation. Respondents have examined the brief of both parties submitted to the Illinois Appellate Court and the Illinois Appellate Court's opinion (Petition, A-2-A-27) and submit that the question whether the search was sustainable as an inventory search was neither argued in the briefs nor raised *sua sponte* by the Illinois Appellate Court. The United States Supreme Court cannot decide issues raised for the first time on review of a state court decision. *Tacon* v. *Arizona,* 410 U. S. 351 (1973), *Hill* v. *California,* 401 U. S. 797 (1971), *Cardinale* v. *Lousiana,* 394 U. S. 437 (1969). Since petitioner did not raise and the Illinois Appellate Court did not consider, the question whether the search was sustainable as an inventory search under *South Dakota* v. *Opperman,* 428 U. S. 364 (1976), respondents contest jurisdiction under 28 U. S. C. § 1257(3) and contend that certiorari must be denied.

II.

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER'S PROCEDURAL DEFAULT CONSTITUTES AN ADEQUATE AND INDEPENDENT GROUND OF DECISION BARRING REVIEW BY THIS COURT.

Petitioner alleges that his Sixth and Fourteenth Amendment rights to a jury chosen from a fair cross-section of the community, *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), were violated when the trial court refused a hearing on petitioner's challenge to the array of prospective jurors from which college students had been excluded. The trial court grounded its decision on petitioner's procedural default, that is, upon the fact that Illinois law requires that motions challenging the jury array be in writing, supported by affidavit and shall state facts which show that the jury panel was improperly selected or drawn. *Ill. Rev. Stat.*, ch. 38, § 114-3(b) (1978). On review, the Illinois Appellate Court agreed with the trial court's assessment of the law and held that due to the procedural default, the trial court properly refused to conduct a hearing on the motion. (Petition, A-17).

In *Henry* v. *Mississippi*, 379 U. S. 443 (1965) this Court held that failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in the Supreme Court so long as the State has a legitimate interest in enforcing its procedural rule. Petitioner thus asserts that the State of Illinois has no legitimate state interest in requiring the motion to be in writing and accompanied by affidavits which state facts showing that the jury panel was improperly selected or drawn. Respondents disagree. The procedural requirement of a written motion with supporting affidavits on motions challenging the jury array serves a legitimate state interest. States undoubtedly have a legitimate interest in the orderly administration of their processes of criminal justice which includes expeditious handling of criminal cases and considerations of judicial economy. On a

motion challenging the jury array, the defendant, in order to establish a prima facie violation of the fair cross-section requirement, must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community and (3) that this under-representation is due to systematic exclusion of the group in the jury selection process. *Duren* v. *Missouri*, 439 U. S. 357 (1979), *Michigan* v. *Tyler*, 436 U. S. 499 (1978). Respondents contend that the nature of the proof required to establish the prima facie showing of a violation in itself justifies the requirement that the motion be written and documented with factual affidavits. A trial court cannot be expected to determine whether the prima facie violation has been established based solely upon counsel's bare oral allegations. Additionally, respondents point out that petitioner in this instance has failed to offer any explanation whatsoever as to why the venire list was unavailable prior to the commencement of jury selection, how trial counsel was able to determine from merely looking at the list of names that none of the persons in the venire were students and why the petitioner could not and did not comply with procedural requirements. The state has a legitimate interest in requiring that a motion challenging the composition of the jury array be in writing and accompanied by affidavits which state facts showing that the jury panel was improperly selected or drawn. Irrespective of the merit or lack thereof in petitioner's claim, petitioner's procedural default on this question constitutes an adequate and independent ground of decision that bars review by this Court. For all these reasons respondents request that certiorari on this issue be denied.

CONCLUSION

For all the reasons herein stated respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 80-870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DENNIS PERRY JR.,

PETITIONER,

vs.

PEOPLE OF THE STATE
OF ILLINOIS,

RESPONDENT.

ON

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

REPLY IN SUPPORT OF CERTIORARI

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The State seeks to justify the search of the vehicle and the examination of the stereo amplifier serial number in the police station parking area on the ground that they had probable cause to believe that the contents of the automobile offended against the law. No such probable cause existed. There is nothing suspicious about students moving from one dormitory to another with personal effects including stereo amplifiers in their cars. Here the officers who saw the students loading things into the car at the dormitory did not identify any of the items being loaded as stolen items. Even when Lt. Keim saw the stereo in the front seat when the Petitioner was arrested, Keim did not recognize it as matching the brand of the stereo stolen. He did not recognize it

as a Pioneer Stereo (R.P.46). He could not see the serial number of the model of stereo at the time of arrest. The police did not have reasonable grounds to believe that the stereo was an "offending item" until after they conducted the search challenged. Until they searched for the serial number, they had no reasonable grounds to believe that the stereo had come from the burglarized house. Without probable cause, the "automobile exception" has no applications.

The state argues for a rule that once the officers have probable cause to believe that an automobile contains items offending against the law, those items may be seized without a warrant long after the automobile is securely in

police custody. Such a contention rips the cases of Chambers v. Maroney, 399 U.S. 42 (1970), Texas v. White, 423 U.S. 67 (1975), and Colorado v. Bannister, U.S. 66 Led2d. 1, 101 S.Ct. 42, (Oct. 20, 1980, out of the whole fabric of search and seizure law created by cases like Delaware v. Prouse, 440 U.S. 648 at 662-663 (1979) (the 4th Amendment protects privacy in autos), Coolidge v. New Hampshire, 403 U.S. 443 (1971) (Warrant required to search an automobile in the absence of a clearly defined exception). Preston v. United States, 376 U.S. 364 (1964) (a warrant is required after the vehicle is secure and the driver is no longer near the vehicle). United States v. Chadwick, 443 U.S. 1 (1977) (exigent circumstances do not justify search of

a footlocker taken from an auto). Arkansas v. Sanders, 442 U.S. 753 (1979) (exigent circumstances do not justify searching a suitcase when an auto carring it is stopped). South Dakota v. Opperman, 428 U.S. 364 (1976) (investigative searches of automobiles require warrants or other clearly defined exceptions). From the totality of these cases, the Court ought to define a rule that prohibits a warrantless search of automobiles after exigent circumstances cease to exist. Colorado v. Bannister , U.S. , 66 Led.2d 1, 101 S.Ct. 42 (Oct. 20, 1980) does not preclude such a rule. There the lug nuts were seized immediately after the vehicle was stopped. Exigent circumstances still existed. Chambers v.

Maroney, 399 U.S. 42 and Texas v. White, 423 U.S. 67 also represent cases where exigent circumstances still exist. In both cases, the search occurred as soon as the car was brought to the police station. "The probable cause factor still obtained at the station house and so did the mobility of the car..." 399 U.S. at 52. In the present case "exigent circumstances" no longer existed. Perry and the car he had been driving were spearated. Perry was in the police station and the car was parked outside the station. The car was not going anywhere and neither was Perry. As long as the driver of the car was locked up, the failure to have a neutral and detached magistrate pass on the issue of probable cause should not be excused on

the ground that searching the car without a warrant would be quicker and more convenient. In Trupiano v. United States, 334 U.S. 699 at 706, the Court observed that "no reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons...to bypass the constitutional requirement..." Rather than permitting the police to justify not getting a warrant on the ground that it is more convenient for the user of the automobile to have the police ransack his vehicle promptly and not hold his vehicle until probable cause can be determined by a magistrate, the Court should fashion a rule which per-

mits the person inconvenienced - the motorist - to choose between 1. consenting to the search now so that he can be on his way, or 2. insisting that a judicial officer determine that probable cause exists for the search. The Court should grant Certiorari to determine how long exigent circumstances last and when a warrant must be obtained.

The State contends that this Court is not free to consider the question: is this warrantless search justified as an "inventory" search? The Petitioner established at the hearing on the Motion to Suppress that the search occurred without a warrant (R.P. 6-7) and that the police did not see the Petitioner violate any law (R.P.48). The State conceeded that

it has the burden of proving the search lawful. (R.P.7). The Petitioner established prima facie that the search was invalid. If the State sought to invoke the routine inventory exemption to the requirement for a search warrant, then it had the burden of advancing that exemption. In United States v. Jeffers, 342 U.S. 48 at 51, the Court said:

> "Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial process. [citations omitted]. Only where incident to a valid arrest [citations ommitted] or in "exceptional circumstances", [citations omitted] may an exemption lie and then the burden is on those seeking the exemption to

show the need for it, McDonald v. United States, 335 U.S. 451 at 455-456." 342 U.S. at 51. See also Vale v. Louisiana, 399 U.S. 30 at 34.

From this allocation of the burden of proof, it follows that if the proceeding in the lower courts failed to preserve the argument that the search was justified as an inventory search, then it is the Respondent, not the Petitioner, who is barred from relying on that special exception to the warrant requirement.

The Respondent reads the record too narrowly. At every stage of the proceedings in the lower courts, the

Petitioner objected to the illegal search and seizure on the grounds that the search and seizure offended the 4th and 14th Amendment. The trial court denied the Motion to Suppress (R.P. 87-86), admitted the items seized over objection (R.P. 371), denied the Motion for new trial (report of sentencing hearing 20-21), the Appellate Court held that the search did not offend Petitioner's 4th and 14th Amendment Rights 401 N.E. 2d at 1269 Petition A-19 through A-22 and the Illinois Supreme Court denied Leave to Appeal.

The record clearly demonstrates that the search was investigative rather than an inventory search. Yet the State in the trial court characterized the search as an "inventory

(R.P.85). That contention should be rejected because the evidence does not support that conclusion. In any event, it was up to the State, not the Petitioner, to prove the justification, since the State failed to advance that justification in this Court that justification should be rejected.

For the reasons stated in the Petition for a Writ of Certiorari and in this Reply, Petitioner asks the Court to grant Certiorari and reverse the Judgment of the Illinois Supreme Court and Illinois Appellate Court.

Respectfully submitted,

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